Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term 1976

No. 76-301

SAM GARRISON, WARDEN,
North Carolina Central Prison,

Petitioner

v.

RICARDO Z. RESENDEZ,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RUFUS L. EDMISTEN
Attorney General

RICHARD N. LEAGUE
Assistant Attorney General

Post Office Box 629
Raleigh, North Carolina 27602

Telephone: (919) 829-7188
ATTORNEYS FOR PETITIONER

INDEX

Opinion Below 1

Jurisdiction 1

Question Presented 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ:

I. THE EQUITABLE DOCTRINE OF DELIBERATE BY-PASS IS MISUNDERSTOOD AND THEREFORE VIRTUALLY UNAVAILABLE IN THE STATES OF THE FOURTH CIRCUIT. 2

Conclusion 5

APPENDICES

A. Order of the United States District Court for the Eastern District of North Carolina 6

B. Opinion of the United States Court of Appeals for the Fourth Circuit 15

TABLE OF CASES

Fay v. Noia, 372 US 391 (1962) 2

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Warden Sam Garrison, prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Fourth Circuit in Case Number 74-1930, *Ricardo Z. Resendez v. Sam Garrison, North Carolina Central Prison.*

OPINION BELOW

The opinion of the United States Court of Appeals styled as above is not yet reported but is printed as Appendix B to this petition (pp. 16-20, *post*).

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC

1254(1), and within ninety days of the date of the denial of the petition to rehear, June 8, 1976. Original decision in the case was dated and entered on December 3, 1975.

QUESTION PRESENTED

WHETHER, DESPITE VOLUNTARY AND INTELLIGENT DECISION TO FOREGO APPEAL, A FINDING OF THE DELIBERATE BY-PASS OF STATE REMEDIES IS PRECLUDED MERELY BECAUSE A PETITIONER WAS ADVISED THAT THE DEATH PENALTY MIGHT BE IMPOSED ON RETRIAL.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 28 USC 2243 as interpreted in *Fay v. Noia*, 372 US 391 (1962).

STATEMENT OF THE CASE

The first part of Appendix A, the District Court's opinion, pp. 6-8, *post*, provides an excellent STATEMENT to which the Court is respectfully referred in the interest of avoiding repetition.

REASONS FOR GRANTING THE WRIT

I

THE EQUITABLE DOCTRINE OF DELIBERATE BY-PASS OF STATE REMEDIES IS MISUNDERSTOOD AND THEREFORE VIRTUALLY UNAVAILABLE IN THE STATES OF THE FOURTH CIRCUIT.

In 1962, this Honorable Court announced the doctrine of deliberate by-pass of state remedies as an optional, preclusive factor in deciding habeas corpus cases. *Fay v. Noia*, 372 US 391 (1962) was the decision in which it appeared and the Court had this to say on the subject:

> ". . . we recognize a limited discretion in the federal judge to deny relief to an applicant under certain circumstances. Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope 'dispose of the matter as law and justice require', 28 USC 2243; and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles [cite omitted]. Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. Narrowly circumscribed, in conformity to the historical role of the writ of habeas corpus as an effective and imperative remedy for detentions contrary to fundamental law, the principle is unexceptional. We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in doing so has forfeited his state court remedies."

Virtually no use has been made of this doctrine, however, and this is particularly so in the five states comprising the Fourth Circuit. This is evidently because the view in this Circuit reflects the misconception that:

> ". . . the intelligent, rational choice made not to appeal when exercise of the right to appeal is threatened with harsh consequence is not such a deliberate by-passing of the state court system as to constitute a wavier of his right to federal review of federal questions", *Resendez v. Garrison*, *supra*, p. 18, *post*.

This flies in the face of this Court's language in *Fay v. Noia*, *supra*, that:

> "This is not to say that in every case where a heavier penalty, even the death sentence, is a risk incurred by taking an appeal or otherwise foregoing a procedural right, waiver as we have defined it, cannot be found. Each case

> must stand on its own facts. In the instant case, the language of the judge in sentencing Noia . . . made the risk that Noia, if reconvicted, would be sentenced to death, palpable and unusually acute.". *id.* at 440.

The decision of the Fourth Circuit therefore reflects an undue emphasis on the factor of increased punishment at the expense of other relevant factors. It leads to a wrong result here for, although both Noia and Resendez faced the possibility of the death penalty on retrial, the similarity in their cases ends there. Noia's case featured: (a) an obviously coerced confession which provided the sole evidence against him; (b) trial in 1942, a time in which the death penalty was frequently used; (c) a chance sentence of life imprisonment, evidently given only because the judge's wife talked him out of imposing the death penalty the morning before sentencing; (d) the possibility of resentencing by the same judge after a successful appeal; and (e) deterrence from appeal due to indigence as well as the possibility of the death penalty. By contrast, Resendez' case involved none of these additional features or motivations. Instead, at his post-conviction hearing, the credible evidence showed that both Resendez and his attorneys felt an appeal would not be beneficial as there was no reasonable expectation of a more favorable verdict on re-trial; that he had been given a fair trial; that a victory had been won by beating the death sentence; and that upon re-trial, a death sentence might be imposed. Taking these together, they show that the significance of the death penalty in this case was not the likelihood of its imposition, since there was no "risk . . . palpable and unusually acute". Instead, the significance of the death penalty lay in the fact that it was a needless risk since Resendez had received a fair trial (unlike Noia), and since Resendez could not realistically hope for a better verdict on retrial (again unlike Noia). These are crucial differences and dictate a different result from that reached by the Fourth Circuit, which in effect, held none of the above to be important other than the possibility of a death sentence.[1]

CONCLUSION

It is respectfully submitted that because of the above a writ of certiorari to review the decision of the Court of Appeals should be issued and the decision either summarily reversed or set for briefing and argument.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

Richard N. League
Assistant Attorney General

Post Office Box 629
Raleigh, North Carolina 27602

Telephone: (919) 829-7188

ATTORNEYS FOR PETITIONER

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[1]At his state post-conviction hearing, Resendez' own evidence was that he forwent appeal out of fear of trial on an additional capital case. This was not credible, however since he filed writs seeking trial on this charge shortly after deciding not to appeal. He also testified that he forwent appeal to "con" his lawyers out of his trial transcript in order to use it for post-conviction purposes, which, if true, was definitely a tactical maneuver qualifying as a deliberate by-pass. Neither of the above were found as facts, however, and instead, the evidence from his lawyers was believed.

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
NO. 74-21-HC

RICARDO Z. RESENDEZ, Petitioner,	]	
v.	]	MEMORANDUM DECISION
SAM GARRISON, Warden, North Carolina Central Prison, Respondent.	]	

The petitioner, a state prisoner, has been allowed to file in forma pauperis an application for a writ of habeas corpus.

At the November 1969 Criminal Session of the Robeson County Superior Court, the petitioner was convicted by a jury of first degree murder, felonious escape, and kidnapping, and sentences of life imprisonment, 2 years, and 10 to 15 years, respectively, were imposed, to be served consecutively.[1] The petitioner did not appeal, but his codefendant, who was convicted only of escape and first degree murder, appealed and his convictions were affirmed. State v. Lee, 277 N.C. 205 (1970).

A summary of the State's evidence appears in that opinion. The evidence of guilt presented by the State was overwhelming and not contradicted as to any material point. The petitioner testified at his trial, against the advice of his counsel, and his

[1]Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972) had not been decided at the time of petitioner's trial. Under North Carolina Gen. Stat. §14-17, in effect at the time of petitioner's trial, the jury had the unbridled discretion to recommend a sentence of life imprisonment upon a verdict of guilty of first degree murder. Absent such a recommendation, the death penalty was mandatory. The jury in petitioner's case, returned a verdict of guilty of first degree murder, and recommended that he be imprisoned for life.

testimony substantially corroborated the State's evidence in all material respects. The evidence tended to show that on June 2, 1969, petitioner, during the course of a felonious escape, shot and killed a prison guard, and kidnapped another guard.

On April 3, 1970, petitioner filed in the Superior Court of Robeson County a paper writing entitled "Appeal for a Writ of Review in Forma Pauperis," under North Carolina Gen. Stat. § 15-217. The petition was denied on May 27, 1970.

On June 5, 1970, he filed in the Superior Court of Robeson County a second "Appeal for Writ of Review in Forma Pauperis." Relief was denied on August 12, 1970. Petitioner appealed this second denial of relief and by order of Septmber 25, 1970, the North Carolina Court of Appeals remanded the case to the Robeson County Superior Court for a plenary hearing. J. Robert Gordon, Esquire, of the Scotland County bar was appointed on December 7, 1970, to represent petitioner.

In petitioner's original June 5, 1970 petition, he alleged that his convictions were invalid for the following reasons:

(1) That his counsel had rendered him ineffective assistance.

(2) That he was not notified until the day the trial began that the escape charge was to be tried, and that, therefore, he did not have ample opportunity to prepare a defense to the escape charge.

(3) That his prior criminal record was introduced into evidence prior to his testimony.

(4) That the trial court erred in denying him a private psychiatric examination.

(5) That the trial court erred in instructing the jury that they could not return a verdict of guilty of second degree murder.

(6) That color photographs of the prison guard, whom petitioner was alleged to have murdered, were introduced

into evidence for the purpose of inflaming the minds of the jurors.

On October 29, 1971, petitioner's court-appointed counsel filed an "Amended Petition for Review." The only claim specifically raised in the amended petition was the claim that petitioner's counsel had rendered him ineffective assistance. Claim No. 2 was re-alleged in support of the claim that petitioner's counsel had been ineffective. Claims Nos. 3 and 4 were re-alleged in further support of the claim of ineffective assistance of counsel in that counsel failed to file a direct appeal. Claims Nos. 5 and 6 were abandoned in the amended petition. In addition, petitioner's trial counsel was alleged to have been ineffective in that (1) they permitted the solicitor to propound prejudicial questions during the voir dire of prospective jurors; (2) they permitted prejudicial security measures by law enforcement officers, e.g., the handcuffing of petitioner in the presence of the jury; and (3) they advised petitioner that there were no grounds for an appeal, when there were several grounds for appeal.

It appears, therefore, that the only claim actually presented in the state post-conviction proceeding was the claim of ineffective assistance of counsel. All other claims or issues were alleged, if at all, as indicia of ineffective assistance.

The reasons that post-conviction counsel amended the petition to state the allegations and claims in this manner do not affirmatively appear in the record. However, an examination of the North Carolina law regarding post-conviction proceedings yields a likely explanation. It is the law in North Carolina that "Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." State v. White, 274 N.C. 220 (1968). Where a petitioner has failed to assert errors in a direct appeal, and the failure to appeal was through no fault of his own, the North Carolina post-conviction remedy is a belated appeal through petition for a writ of certiorari, State

v. Wilson, 269 N.C. 297 (1967); State v. Roux, 263 N.C. 149 (1964).

In this case, the state post-conviction court found that petitioner knowingly, understandingly, and voluntarily waived his right to appeal. Therefore, under *State v. White, supra,* most of petitioner's original claims would not have been cognizable in the state post-conviction proceeding.

The original application for a writ of habeas corpus which petitioner sought leave to file in forma pauperis in this court was totally conclusory. Rather than deny the application, this court, by order dated October 6, 1973, allowed petitioner an opportunity to amend his application. Petitioner thereupon submitted an amendment to his application, and attached thereto the "Amended Petition for Review", prepared by his counsel in the state post-conviction proceeding, as well as other documents. This court was of the opinion that the "Amended Petition for Review" contained an adequate statement of petitioner's claims and considered it as incorporated by reference as a part of the application. The other documents were deemed to be superfluous and, by order dated January 16, 1974, the clerk was directed to return them to the petitioner.

Liberally construing the petitioner's application and the amendments thereto, the following appear to be grounds upon which he alleges that his convictions and sentences are unconstitutional:

(A) That he was rendered ineffective assistance of counsel.

(B) That his prior criminal record was introduced into evidence before he testified.

(C) That he was denied a change of venue.

(D) That he was denied a private psychiatric examination.

(E) That he received notice only on the day of the trial that the escape charge was to be tried.

(F) That the trial judge improperly charged the jury not to consider a verdict of guilty of second degree murder.

(G) That color photographs of the murder victim were introduced to inflame the minds of the jurors.

(H) That during the voir dire of prospective jurors, the solicitors propounded questions prejudicial to the petitioner.

(I) That law enforcement agents employed security measures prejudicial toward plaintiff, such as converging about him in the court room at the end of a court day before the jury had made its exit, and handcuffing him in the presence of jurors.

In regard to claim "A, the state post-conviction court found as follows:

> The petitioner was represented from the date of his arrest until the completion of his trial by competent and experienced attorneys, and their representation of the petitioner was adequate and effective, in the best interests of the petitioner in accordance with the professional judgment of his counsel, and in no way resulted in prejudicial error entitling petitioner to relief in a post conviction proceeding.

This finding is amply supported by the record and is hereby adopted by this court, Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 743 (1963), and application of correct standards of federal constitutional law reveals that claim "A is without merit.

The state post-conviction court, as noted earlier in this decision, also found that petitioner "knowingly and understandingly and voluntarily waived his right of appeal by electing not to appeal at the time of the judgment." This finding is amply supported by the record. Petitioner wrote to Ellis E. Page, Esquire, one of his co-counsel and stated, "I don't want to appeal, but I might try a post-conviction if I see fit to at a later date. . Thank you again for all you have done. You helped

save my life. . ." (PCR p. 80-81). It appears that counsel did advise petitioner not to appeal. Mr. Page testified that he advised petitioner that he did not "see where an appeal would bnefit him," and that a new trial would carry with it the risk of the death penalty. (PCR p. 81) Mr. McLean also advised petitioner that an appeal would not serve any useful purpose.

The post-conviction record further reveals that petitioner's counsel wrote to him on December 1, 1969, and advised petitioner of the deadline for filing an appeal, and advised him that they would file an appeal on his behalf if he so desired. (PCR p. 100). The petitioner did not request an appeal in response to the letter from his counsel. Under date of November 30, 1969, petitioner wrote to Mr. McLean as follows:

> "First of all, I want to thank you very much for all you've done for me. Thank you for continuing with my defense although I made your job very difficult at times. . . .
>
> . . . I have decided not to appeal my case. The only satisfaction I received from the verdict is the fact that we beat the Solicitor. I know there were a lot of errors made in the trial. If the Solicitors had stuck to the bare facts they could have gotten the death penalty, but when Joe Freeman got carried away in selecting the jury, and up to that time I wasn't going to fight the case. Also, there were more people than I figured hoping that I wouldn't get death. My sentence is greater than death. (PCR 102-103)

It appears that the advice which counsel gave to petitioner that an appeal would serve no useful purpose was in the best interests of petitioner. The evidence of guilt introduced by the State was overwhelming, and was substantially corroborated by petitioner's testimony. In light of the overwhelming evidence of guilt the petitioner could not reasonably have expected a more favorable result upon a new trial, especially in view of his stated opinion that upon "the bare facts [the prosecution] could have gotten the death penalty."

Counsel did advise petitioner that upon a new trial, there was the risk of the imposition of the death penalty. However, the risk of the death penalty upon an appeal does not automatically vitiate the intelligent and voluntary waiver of an appeal. Each case must be judged on its own facts and circumstances. *Fay v. Noia*, 372 U.S. 391, 440, 83 S.Ct. 822, 849 (1963). In this case, both petitioner and his counsel had considered it a victory when the jury recommended life imprisonment. Petitioner's letters to his counsel indicate satisfaction with the verdicts and sentences. He stated clearly that he thought there were errors, but that he did not want to appeal. Counsel offered to perfect an appeal if petitioner so desired, but petitioner unequivocally stated to counsel, in writing, that he had decided not to appeal. His statement to Ellis E. Page that he did not want to appeal, but that he might, at a later date, file a post conviction proceeding indicates a deliberate bypass of the state remedy of a direct appeal.

Petitioner contends that the state discouraged an appeal by threatening to prosecute another charge of rape against him. His attorneys, at the state post-conviction hearing, testified that they were not appointed to represent petitioner on the rape charge and were not concerned with it. (PCR p. 82, 101). Furthermore, petitioner, in the letter dated November 30, 1969, to Mr. Page, indicated that the outstanding rape charge did not dissuade an appeal. (PCR p. 80.) The letter reads, in pertinent part, as follows:

> Mr. Page, I would be more at peace with myself if my remaining charge could be disposed of as quickly as possible. I want a trial date set or else have the Solicitor drop the charges. I want a writ filed asking for a speedy trial. I won't rest until I know whether or not I will be tried on the charge pending.

It appears to this court that the finding of the state post-conviction court that petitioner "knowingly and understandingly and voluntarily waived his right of appeal" is amply supported by the record, and this court adopts that finding. Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 743 (1963).

This court is of the opinion that petitioner "deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies." Fay v. Noia, 372 U.S. 391, 438, 83 S.Ct. 822, 849 (1963). Therefore, this court, in its discretion, is of the opinion that relief should be denied on petitioner's remaining claims, enumerated (A) through (I) above. All of those claims should have been raised on direct appeal.

In Fay v. Noia, 372 U.S. 391, 439, 83 S.Ct. 822, 849 (1963), the Court said:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself by holding a hearing or by some other means, of the facts bearing upon the applicant's default.

It is apparent, from the records before this court, that petitioner's waiver of his right to appeal was "an intentional relinquishment or abandonment of a known right or privilege", Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938), and that the wavier was based on petitioner's satisfaction with the result of his trial. That petitioner may have changed his mind at a subsequent time in no way vitiates the validity of that waiver. Now, therefore,

It is ORDERED that judgment be entered denying petitioner's application for a writ of habeas corpus.

This 25th day of June 1974.

ALGERNON L. BUTLER
CHIEF JUDGE
UNITED STATES DISTRICT COURT

Appendix B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-1930

Ricardo Z. Resendez,

Appellant,

versus

Sam Garrison, Warden,
N. C. Central Prison,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh.
Algernon L. Butler, District Judge.

Argued October 7, 1975 Decided December 3, 1975

Before HAYNSWORTH, Chief Judge, WINTER, Circuit Judge, and WATKINS, Senior District Judge

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Joseph J. Kalo [Court-appointed] for appellant; Richard N. League, Assistant Attorney General of North Carolina (Rufus L. Edmisten, Attorney General of North Carolina, on brief) for appellee.

HAYNSWORTH, Chief Judge:

The question is whether Resendez deliberately bypassed state appellate remedies thereby foreclosing federal court consideration of his federal claims. The district court found a deliberate bypass and denied the writ of habeas corpus. We reverse and remand to the district court for a hearing on the merits of Resendez's claims.

On November 28, 1969 a jury in Robeson County, North Carolina convicted Resendez of felony murder, kidnapping and escape. He received a life sentence. After the verdict, Resendez conferred with his attorneys concerning an appeal, and they advised that there were no adequate grounds for an appeal and that if he should be successful on appeal, a new jury upon retrial might sentence him to death.

At that time in North Carolina, a jury in a capital case, such as felony murder, possessed absolute discretion to decide whether a defendant received a life sentence or the death penalty upon conviction. N.C. Gen. Stat. § 14-17 (1969). Resendez' attorneys reckoned that an appeal, a reversal, and a subsequent retrial might lead to the imposition of the death penalty and so informed Resendez.[1] Confronted with this dilemma, Resendez chose not to appeal. Such a rational decision, while it may foreclose state post-conviction remedies, is not that kind of deliberate bypass of the state court system that precludes legitimate constitutional assertions in the federal courts.

The Supreme Court has held that the motivation behind the individual's decision not to appeal determines whether the person has engaged in a deliberate bypassing of state procedures, foreclosing federal remedies. *Fay v. Noia*, 372 U.S. 391, 439 (1963). In that case, Noia was confronted with the choice of remaining satisfied with life imprisonment or appealing, which if successful, might lead to retrial and the imposition of the death sentence. Noia, like Resendez, opted not to appeal, and the court refused to interpret his actions as a strategic circumvention of state procedures.

In a smiliar case in this court, *Wilson v. Bailey*, 375 F. 2d 663 (4th Cir. 1967), we decided that a North Carolina defendant's failure to appeal his first degree murder conviction,

[1]Resendez also claims he was under the impression that, if he appealed, he would be put to trial on a related rape charge which was subsequently dismissed.

following a recommendation of life imprisonment by the jury, was not a deliberate bypass where his attorneys counselled him that upon a successful appeal and retrial he would face a possible death penalty if found guilty or commitment to the state mental asylum if his insanity defense prevailed. *Id* at 669. Now, as then, we believe that an intelligent, rational choice not to appeal when exercise of the right to appeal is threatened with harsh consequences, is not such a deliberate bypass of the state court system as to constitute a waiver of his right to federal review of federal questions.

Accordingly, we reverse and remand for a hearing on the merits of Resendez's claims.

REVERSED.

WATKINS, Senior District Judge, dissenting:

Appellant, during the course of a felonious escape, shot and killed a guard, and kidnapped another guard. In November 1969 he was convicted by a jury of first degree murder, felonious escape and kidnapping. The jury imposed sentences of life imprisonment, two years and ten to fifteen years, respectively, to be served consecutively.

A few days later Appellant wrote to one of his attorneys, thanking him for all he had done, and stating:

> ". . . I have decided not to appeal my case. The only satisfaction I received from the verdict is the fact that we beat the Solicitor. . . . If the Solicitor had stuck to the bare facts they could have gotten the death penalty . . ."

About a month later he wrote to his other attorney, and among other things said:

> ". . . I don't want to appeal, but I might try a post-conviction if I see fit at a later date."

Appellant did file a first and second "Appeal for Writ of Review in Forma Pauperis" in the State courts, on the second of which a plenary hearing was held. Relief was denied, largely

on the ground that Appellant had knowingly, understandingly, and voluntarily waived his right to appeal.

In the habeas corpus case below, Judge Butler held that this "finding is amply supported by the record." He also made his own finding that Appellant " 'deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.' *Fay v. Noia*, 372 U.S. 391, 438, 83 S.Ct. 822, 849 (1963)."

The majority opinion in this case relies upon *Fay v. Noia*, but does not mention the qualification therein:

> "This is not to say that in every case where a heavier penalty, even the death penalty, is a risk incurred by taking an appeal or otherwise foregoing a procedural right, waiver as we have defined it cannot be found."

(372 U.S. 391, 440).

The majority opinion does not discuss or even mention, *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973).[1] There the Court said:

> "Petitioner's final argument is that harsher sentences on retrial are impermissible because, irrespective of their causes and even conceding that vindictiveness plays no discernible role, they have a "chilling effect" on the convicted defendant's exercise of his right to challenge his first conviction either by direct appeal or collateral attack. What we have said as to *Pearce* demonstrates that it provides no foundation for this claim. To the contrary, the Court there intimated no doubt about the constitutional validity of higher sentences in the absence of vindictiveness despite whatever incidental deterrent effect they might have on the right to appeal. . . ."

[1]The writer of this opinion did refer to *Chaffin* during oral argument. *Chaffin* is not cited in the briefs on either side.

(412 U.S. at 29, footnote omitted).

Chaffin also expressly holds that:

> "The choice occasioned by the possibility of a harsher sentence, even in the case in which the choice may in fact be 'difficult,' does not place an impermissible burden on the right of a criminal defendant to appeal or attack collaterally his conviction."

(412 U.S. 17, 35).

As examples of difficult choices, the court referred to the problem confronting a defendant, in a case in which the jury determines guilt and penalty in a single non-bifurcated trial, as to whether he should forego his right to remain silent on the issue of guilt, in order to be able to argue his case for mitigation of punishment (412 U.S. at 31-33); and the choice of accepting a "plea bargain" or of going to trial (412 U.S. 30-31).

That the choice may be difficult does not prevent it from being a knowing, understanding and voluntary choice. Here the choice was to by-pass his unchilled right to appeal.

Moreover, it is not clear to the writer that the decision of the majority will be to Appellant's benefit. In *Fay v. Noia*, the Supreme Court majority did not remand for a new trial, but ordered the release of the Appellant. Here the case is remanded for a hearing on the merits. If as a result of that hearing it should be determined that Appellant is entitled to the issuance of the writ, the State of North Carolina almost certainly would be allowed a reasonable time to grant a belated appeal, or to retry the Appellant. On such retrial a jury might assess the death penalty, a result that Appellant studiously sought to avoid.